Filed 9/29/09 P. v. Edgar CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXANDER LEE EDGAR,

Defendant and Appellant.

F056354

(Super. Ct. No. BF122533A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County.

Stephen P. Gildner, Judge.

Elizabeth Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Gomes, J. and Hill, J.

STATEMENT OF THE CASE

On April 2, 2008, the Kern County District Attorney filed an information in superior court charging appellant Alexander Lee Edgar as follows:

Count 1—first degree burglary (Pen. Code, § 460, subd. (a));[1]

Count 2—attempted first degree burglary (§§ 460, subd. (a), 664); and

Count 3—misdemeanor unlawful entry (§ 602, subd. (k)).

On April 4, 2008, appellant was arraigned and pleaded not guilty.

On April 21, 2008, appellant moved to suppress evidence (§ 1538.5). On April 28, 2008, the prosecution filed written opposition to the suppression motion. On May 6, 2008, the trial court denied the suppression motion.

On June 2, 2008, jury trial commenced and the court dismissed count 1 on the district attorney's motion. On June 5, 2008, the jury returned a guilty verdict on count 3 but could not reach a verdict on count 2 and the court declared a mistrial as to that count.

On July 18, 2008, the appellant entered into a plea agreement with the prosecution, pleading guilty to a newly-added count 4 for felony vandalism (§ 594, subd. (a)) in exchange for a promise of probation at the outset. The trial court dismissed the attempted burglary and unlawful entry counts.

On September 11, 2008, the trial court conducted a sentencing hearing and placed appellant on felony probation for a period of three years, subject to various terms and conditions, including the service of six months in county jail with two days of custody credits. The court ordered appellant to pay a $10 fine (§ 1202.5), a $20 fee (§ 1465.8, subd. (a)(1)), and $40 per month in probation costs. The court imposed a $200 restitution fine (§ 1202.4, subd (b)) and imposed and suspended a second such fine pending successful completion of probation (§ 1202.45).

On October 22, 2008, appellant filed a timely notice of appeal.

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[1] Subsequent statutory references are to the Penal Code.

STATEMENT OF FACTS

The following facts are taken from the report of the probation officer filed September 11, 2008. At about 4:30 p.m. on February 28, 2008, Bakersfield police responded to a report of a burglary. A suspect, the appellant, had been detained when they arrived at the scene. Ina Taylor reported she had been inside her apartment when she heard the sound of a nearby wooden fence breaking. A short time later, Taylor's neighbor, Tony Rodriguez, instructed her to call the police because he had seen someone breaking a window located west of the residence of one Uhler.

Rodriguez told police he had been inside his apartment when he heard the sound of a wooden fence being broken just west of his apartment. Rodriguez went outside and saw appellant with a white T-shirt wrapped around one of his hands. Appellant hit a window with his wrapped hand, causing it to break. Appellant then began removing glass from the window. When Rodriguez yelled, "What are you doing?," appellant fled through the broken fence. Police officers conducted a field show up and Rodriguez positively identified appellant as the individual who attempted to enter the residence. The officers arrested appellant at the scene.

DISCUSSION

Appellant contends the trial court erroneously denied his suppression motion because the police lacked reliable facts amounting to reasonable suspicion to detain him and lacked probable cause to arrest him.

Appellant specifically contends the prosecution presented no testimony regarding the circumstances of his detention, such as the location of the detention and whether it involved a warrantless entry into appellant's apartment. Appellant points out the prosecution presented the testimony of a witness to the offense along with the testimony of an officer who arrested appellant after he had been detained by other officers and identified by a witness. Appellant notes the arresting officer was not present at the initial detention and offered no testimony regarding the circumstances of that detention. Thus,

appellant contends the prosecution failed to meet its burden of proving that appellant was lawfully detained.

A. The Suppression Motion

On April 21, 2008, appellant filed a suppression motion and supporting documents. Citing *People v. Harvey* (1958) 156 Cal.App.2d 516 (*Harvey*) and *People v. Madden* (1970) 2 Cal.3d 1017 (*Madden*), appellant asserted (1) the prosecution bears the burden of proof once a defendant makes a prima facie showing that a warrantless search or seizure has occurred; (2) the police did not possess reliable facts amounting to reasonable suspicion to detain him; and (3) the police did not have probable cause to arrest him.

On April 28, 2008, the prosecution filed written opposition to the motion, asserting the prosecution satisfied the *Harvey-Madden* requirements by presenting the first officer to receive the information about the crime. The prosecution also maintained the officer had reasonable suspicion to detain and the arrest was supported by probable cause.

On May 5, 2008, appellant filed supplemental points and authorities in support of his motion, asserting "[w]here an officer purportedly relies on information transmitted through official channels to conduct a warrantless search or seizure, the prosecution must bear the burden to show that, at the time of the actual warrantless search or seizure, the officer possessed the information in question."

B. Facts Underlying the Suppression Motion

Tony Rodriguez testified he observed someone breaking his neighbor's apartment window at about 4 p.m. on February 28, 2008. Rodriguez said he was about four feet away outside of his own apartment. Rodriguez's apartment was adjacent to the one in which the window was broken. Rodriguez asked a neighbor to call 911 and gave the neighbor a description of the suspect. Rodriguez told the neighbor the suspect was a white male wearing a black T-shirt, a chain, and jeans. At the suppression hearing,

Rodriguez said the suspect had light sandy blonde hair, had a terry cloth wrapped around his hand, and used the wrapped hand to punch the glass of the apartment window. Rodriguez could not remember if he had given his neighbor a description of the person's age.

When the suspect stopped, Rodriguez asked what he was doing. The suspect then fled through a gate or wooden fence. Rodriguez watched the suspect enter a first floor apartment in the 800 block of 30th Street. A wooden fence separated Rodriguez's apartment complex from the 30th Street complex that the suspect entered. Rodriguez said he watched the suspect the entire time.

Rodriguez said he spoke with a police officer, gave him a description of the suspect, and also gave the officer the address to which the suspect departed. Officers later asked Rodriguez to examine a group of four white males on a street corner. Appellant was one of the four males and Rodriguez identified him as the suspect. Rodriguez testified that appellant is not one of his neighbors.

Bakersfield Police Officer Bradley Carey testified he responded to the 30th Street apartment complex at 4:30 p.m. on February 28. Carey had heard about the apartment break-in during a radio broadcast from the Bakersfield Police Department communications center. When Carey arrived at the scene, other officers had detained several people, including appellant. Carey said appellant matched the description of the suspect broadcast by the communications center. The dispatch indicated the suspect was a white juvenile in black clothing. To the best of Carey's recollection, the detainees other than appellant were not dressed in black clothing.

Carey said appellant had fresh cuts on his hands and was arrested because a witness had identified him. Officer Carey was not present when Rodriguez identified appellant.

C. Ruling of the Trial Court

On May 6, 2008, the court conducted a contested hearing on the suppression motion and took the matter under submission. Later that same day, the court summarily denied the motion by minute order.

D. Applicable Law

A trial court's factual findings following a hearing under section 1538.5 shall be upheld if they are supported by substantial evidence. (*People v. Leyba* (1981) 29 Cal.3d 591, 596-597 (*Leyba*); *People v. Lawler* (1973) 9 Cal.3d 156, 160; *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223-1224.) The trial court has the power to determine credibility of witnesses, resolve conflicts in the testimony, and draw factual inferences. However, whether a search is reasonable under the Constitution is a question of law, and the appellate court will conduct an independent review to determine if the facts, as found by the trial court, fall within the constitutional standard of reasonableness. (*Leyba, supra*, 29 Cal.3d at pp. 596-597.)

The *Harvey-Madden* rule is a set of evidentiary rules established to govern the manner in which the prosecution may prove the underlying grounds for an arrest when the authority to arrest was transmitted to the arresting officer through police channels. (*People v. Collins* (1997) 59 Cal.App.4th 988, 993.) ""'It is well settled that while it may be perfectly reasonable for officers in the field to make arrests on the basis of information furnished to them by [official channels], 'when it comes to justifying the total police activity in a court, the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness.' ... To hold otherwise would permit the manufacture of reasonable grounds for arrest within a police department by one officer transmitting information purportedly known by him to another officer who did not know such information, without establishing under oath how the information had in fact been obtained by the former officer.... 'If this were so, every utterance of a police officer would instantly and automatically acquire the dignity of

official information; "reasonable cause" or "reasonable grounds," ... could be conveniently fashioned out of a two-step communication; and all Fourth Amendment safeguards would dissolve as a consequence.'"""" (*Id.* at pp. 993-994.)

The People may rely on circumstantial evidence to prove that the information from official channels precipitating the arrest was not manufactured. (*People v. Armstrong* (1991) 232 Cal.App.3d 228, 245 (*Armstrong*).) The *Harvey-Madden* rule only requires proof that the information justifying the arrest was actually given to the police personnel who in turn furnished it to the arresting officer, i.e., proof that the source of the information on which the arrest was based was something other than an officer's imagination. (*Id.* at pp. 245-246.) Thus, the People need only show that the police personnel furnishing the information that generated the arrest had probable cause to believe the arrest was justified. (*Id.* at p. 246.) Moreover, a police dispatcher or person providing the original probable cause need not testify when their testimony is circumstantially proven by a subsequent officer's investigation. (*Id.* at p. 244.)

Although police may reasonably rely on information received from other officers to support an arrest (*People v. Alcorn* (1993) 15 Cal.App.4th 652, 655), on proper objection, the basis for the transmitting officer's information must be shown to "prove that the source of the information is something other than the imagination of an officer who does not become a witness." (*Madden, supra*, 2 Cal.3d at p. 1021, internal quotation marks omitted.)

"California courts have long and consistently rejected the contention that probable cause for arrest is established where arresting officers are proven to have relied on information furnished by other officers in their own departments, without further prosecution proof the information ... was actually given to [the] officers who transmitted that information to the arresting officers. The further proof requirement was not established to prove the information furnished the arresting officer was true; rather, it was established to prove that the officers furnishing the information to the arresting officers

which triggered the arrest had actually received it, i.e., that the information was not falsely manufactured by those reporting it to the arresting officers to furnish ostensible grounds of probable cause for arrest. This requirement is sometimes called the '*Remers* rule [*Remers v. Superior Court* (1970) 2 Cal.3d 659, 666-667]' or the '*Harvey-Madden* rule.'" (*Armstrong, supra,* 232 Cal.App.3d at p. 234, italics omitted.)

E. <u>Analysis</u>

In the instant case, appellant was not detained or arrested solely as the result of information formulated or manufactured through official police channels. Officer Carey testified he responded to the scene because the Bakersfield Police Department communications center broadcast a dispatch about a subject who had just broken into a residence. Carey was already in the area at the time of the broadcast. Upon Carey's arrival, fellow officers were detaining several subjects and Carey assisted in that detainment. Carey said he initially detained appellant because he heard the broadcast and determined that appellant matched the suspect's description. When detained, appellant appeared to have a couple of fresh cuts on his hands. Carey said he arrested appellant after a witness identified him as the person who broke into the residence.

Tony Rodriguez was the individual who observed the suspect shattering a window to his neighbor's house or apartment at about 4 p.m. The man had broken a wooden fence that separated "our perimeter complex from his." Rodriguez was standing about four feet away from the suspect when the window broke. Rodriguez had one of his neighbors call 911 and provided that neighbor/caller with a description of the suspect—a male Caucasian with light sandy blonde hair wearing a black T-shirt, jeans, and some sort of chain. Rodriguez saw the suspect break the glass with his right hand. That hand was wrapped in a terry cloth and Rodriguez saw him punch the glass.

When Rodriguez confronted the suspect, the latter fled through the broken fence and entered a first floor apartment in a complex in the 800 block of 30th Street. Rodriguez later spoke with a Hispanic police officer and gave the description of the

suspect and his whereabouts. The police eventually conducted a field show up of three or four male Caucasians on the west side of a building at Panama Lane and 30th Street. Rodriguez identified appellant as the individual who broke the window.

In the absence of the actual testimony of a police dispatcher as to how he or she received transmitted information about an offense, the trial court may properly rely on circumstantial evidence to prove the transmitted information must have come from a source outside the police department. (*People v. Johnson* (1987) 189 Cal.App.3d 1315, 1320.) As respondent points out here, citizen eyewitness Tony Rodriguez—from a distance of four feet—observed a crime in progress, observed the flight of the suspect to a specific building, and had another citizen report these facts, along with a physical description of the suspect, to the police. This was circumstantial evidence that the source of information for appellant's detention was something other than "the imagination of an officer who [did] not become a witness." (*Armstrong, supra,* 232 Cal.App.3d at p. 235.)

Appellant insists "[t]he record is silent as to how much of [Rodriguez's] description was transmitted to the dispatcher, and as to how accurate the caller was in recalling Rodriguez's description." Respondent acknowledges "the only remaining 'gap' in the information provided by Rodriguez and then later utilized by Officer Carey was ... whether the officers who initially detained appellant heard the same dispatch that was heard by Officer Carey." The trial court aptly noted at the contested hearing on the motion to suppress: "We do ... have evidence that there was a broadcast and law enforcement detained three or four people. I think that's fair circumstantial evidence that it was generally sent out."

The source and reliability of underlying appellant's detention were amply established circumstantially, such that the purpose of the *Harvey-Madden* rule was satisfied and the evidence was admissible. (*Armstrong, supra,* 232 Cal.App.3d at pp. 243-246; *People v. Orozco* (1981) 114 Cal.App.3d 435, 444-445; *People v. Rice* (1967)

253 Cal.App.2d 789, 793; see also *People v. Poehner* (1971) 16 Cal.App.3d 481, 487-489.)

DISPOSITION

The judgment is affirmed.